FILED
No. 06-680 NOV 06 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARASH ALEXANDER ZARIF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD J. YENGICH
Counsel of Record for Mr. Zarif
YENGICH, RICH & XAIZ
175 East 400 South #400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Should *Franks v. Delaware*, 438 U.S. 154 (1978), be clarified to permit courts to consider whether an officer's deliberate inclusion of material false statements or deliberate omission of material facts in a search warrant affidavit undermines the integrity of the entire affidavit and requires suppression of all fruits of a warrant premised on such an affidavit?

CITATION OF OPINION BELOW

The opinion subject to review is *United States v. Zarif*, 2006 WL 2411442 (10th Cir. 2006), an unpublished decision.

JURISDICTIONAL STATEMENT

The *Zarif* opinion was entered on August 22, 2006. No petition for rehearing or motion for an extension of time to file this petition was filed. This Court's jurisdiction is provided by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

FACTS MATERIAL TO QUESTIONS PRESENTED

The Government charged Zarif with three counts of enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, one count of possession of child pornography, two counts of enticing a minor to engage in prostitution, one count of

possession of a firearm by a restricted person, and one count of possession of methamphetamine.

Prior to trial, Zarif challenged the validity and sufficiency of the search warrant executed at Zarif's residence under *Franks v. Delaware*, 438 U.S. 154 (1978), because the search warrant affidavit contained multiple material falsehoods and/or omissions that were included or excluded intentionally, knowingly or with a reckless disregard for the truth. After considering written and oral arguments from both parties, the district court denied Zarif's request for a *Franks* hearing and denied Zarif's motion to suppress evidence. The trial court found that portions of the search warrant affidavit were false and misleading, and assumed that the misleading inclusions and omissions in the search warrant affidavit were knowingly or recklessly included or omitted by the affiant, but found that because the remainder of the affidavit contained sufficient facts to establish probable cause, suppression was not in order. The trial court's ruling is in the appendix to this petition.

Zarif proceeded to a bench trial, where the trial court convicted him of three counts of enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct under 18 U.S.C. § 2251. The trial court then sentenced Zarif to fifteen years of incarceration followed by sixty months of supervised release.

On appeal, in an unpublished decision, the United States District Court for the Tenth Circuit affirmed the trial court, holding that because probable cause remained after any allegedly false statements were excised from the affidavit, suppression was not required. *United States v.*

Zarif, 2006 WL 2411442 (10th Cir. 2006) at *5. The court of appeals' ruling is in the appendix to this petition.

JURISDICTION OF COURT OF FIRST INSTANCE

The trial court's jurisdiction over this case involving an offense against the laws of the United States was established by 18 U.S.C. § 3231. The jurisdiction of the United States Court of Appeals for the Tenth Circuit was established by 28 U.S.C. § 1291.

ARGUMENT FOR GRANTING OF THE WRIT

The question presented for review is:

> Should *Franks v. Delaware*, 438 U.S. 154 (1978), be clarified to permit courts to consider whether an officer's deliberate inclusion of material false statements or deliberate omission of material facts in a search warrant affidavit undermines the integrity of the entire affidavit and requires suppression of all fruits of a warrant premised on such an affidavit?

This Court should grant certiorari to consider this question, which is important to the reasoned development of Fourth Amendment law.

The current practice under *Franks* requires courts adjudicating suppression motions to seek residual probable cause after excising material intentional, knowing or reckless falsehoods, and/or including material intentional, knowing or reckless omissions. *See Franks*, 438 U.S. 154, 155-56, 171-72. This approach ostensibly does not permit the courts to consider the realistic impact the officer's

dishonesty would have had on the magistrate's probable cause assessment, or whether the magistrate would have issued the warrant had the magistrate known that the officer of the law who sought the warrant had actually or effectively lied to the magistrate under oath. *See id.*

State courts have permitted the more thorough analysis under state law, reasoning that an officer's deceit undermines the integrity of the entire affidavit, and that "[a] deliberate attempt to mislead a judicial officer in a sworn affidavit deserves the most severe deterrent sanction that the exclusionary rule can provide." *State v. Malkin*, 722 P.2d 923, 946 n.6 (Alaska 1986) (citing *People v. Cook*, 583 P.2d 130, 140-41 (Cal. 1978)).

The substantial deference this Court extends to the magistrates' probable cause assessments in warrant cases is designed in part to encourage the police to seek warrants. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 236 (1983); *Ornelas v. United States*, 517 U.S. 690, 696 (1996). While it is laudable to encourage police to seek warrants, *id.*, there is no reasonable policy interest to be served by tolerating police deceit of the magistrates and courts, or by shielding search warrant affidavits involving deliberate deceit by the police from a realistic consideration of the impact the officer's deceit would have had on the magistrate's probable cause assessment had the magistrate been aware that the officer was lying to him or her. *See, e.g., Malkin, supra.* Nor does shielding deceitful search warrant affidavits from thorough scrutiny logically square with deference to magistrates who were deceived. *See id.*

Based on the foregoing, Mr. Zarif respectfully prays that this Court issue the writ.

Respectfully submitted this 6th day of November, 2006.

RONALD J. YENGICH
Counsel of Record for Mr. Zarif
YENGICH, RICH & XAIZ
175 East 400 South #400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

2006 WL 2411442

United States Court of Appeals, Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Arash Alexander ZARIF, Defendant-Appellant.
No. 05-4268.

Aug. 22, 2006.

Karin M. Fojtik, Office of the United States Attorney, District of Utah, Salt Lake City, UT, for Plaintiff-Appellee.

Ronald J. Yengich, Yengich, Rich & Xaiz, Salt Lake City, UT, for Defendant-Appellant.

Before BRISCOE and HARTZ, Circuit Judges, and KRIEGER, District Judge.**

ORDER AND JUDGMENT*

MARCIA S. KRIEGER, District Judge.

In this appeal, Arash Alexander Zarif challenges the trial court's denial of his request for a *Franks* hearing and its finding that sufficient probable cause existed to support a search warrant executed at Zarif's residence. He contends that he identified several false statements in the warrant affidavit that constituted either deliberate falsehoods or which were made with a reckless disregard for

** The Honorable Marcia S. Krieger, United States District Judge for the District of Colorado, sitting by designation.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

the truth, and that, when stripped of the false statements, the warrant affidavit fails to establish sufficient probable cause to permit a search of his residence. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Facts

On or about February 17, 2005, Draper City Police Detective K. Cole signed an affidavit for a search warrant, asserting that he believed that, on or about February 6, 2005, Zarif had transported two minor females to his house for the purpose of engaging in prostitution. Cole's affidavit stated that it was based primarily on interviews conducted with the two minors, who were identified as V1 and V2. The following facts are taken from the affidavit. Except as specifically noted herein, Zarif does not dispute the veracity of the statements in the affidavit.

The affidavit stated that both minors had positively identified Zarif from his driver's license photo placed in a photo lineup. Zarif contends that this statement is false, insofar as V2's recorded interview with Cole reveals that she stated that the photo of Zarif "looks kind of like Alex, but I don't think it's him."

The affidavit went on to state that on January 22, 2005, V2, having previously been introduced to Zarif by a friend, went to Zarif's home and had sexual intercourse with him. On February 6, 2005, V2 called V1, and both girls were picked up by Zarif in his car. The affidavit states that V1 identified certain details of Zarif's car. As they were driving, V1 asked Zarif how he made enough money to be able to afford the car. Both V1 and V2 told Cole that Zarif responded by saying that he "sold shoes." However, in V2's recorded interview with Cole, she had

stated that Zarif had said he was a "middleman" for a shoe company.

The affidavit further states, according to V1, Zarif then stated that he owned a "brothel," or, according to V2, that he ran an "escort service." The minors asked how much money the "girls" made working for him, and were told that they earned between $300 and $500 for sexual intercourse, and $50 for performing oral sex. Zarif inquired as to whether the minors were interested in making some money that night. V2 immediately agreed, but V1 hesitated. Zarif then began calling unknown persons on his cell phone to arrange a liaison at his house. The affidavit states that V2 "believes the phone numbers for the people [Zarif] called were recorded in his cell phone because he looked their number up in the phone." Zarif contends that V2's recorded interview does not indicate that V2 ever voiced such a belief or asserts that she saw Zarif look the numbers up in his phone.

Zarif pulled the car into a garage located on the bottom level of a residence. The affidavit recites V1's identification of the layout of the residence, including the furnishings of the main level, and the location of a bathroom and bedroom on higher floors. Zarif contends here that "Both minors did not describe the residence in great detail." Once inside, Zarif again asked if the minors wanted to make some money by performing oral sex, and both minors agreed. Zarif sent the minors to the bathroom to "get ready." Three males then arrived, described by both minors as being a "Native American-Indian," a "Mexican," and a "white guy." Zarif brought the "Indian" and the "Mexican" to the bathroom, and told the minors to begin. V1 insisted that the men use a condom, and the men put on condoms. V2 stated that neither man used condoms at

any time. V1 began performing oral sex on the "Indian," and V2 performed oral sex on the "Mexican." After five minutes, they switched partners. V1 states that she waited until the "Mexican" procured another condom before she would perform oral sex on him. Both minors state that V2 finished first, and left the bathroom, and that V1 finished about five minutes later. Zarif alleges that the affidavit fails to disclose the fact that V1 gave Cole inconsistent stories regarding the acts she performed, namely, that although she told Cole in the interview that she performed oral sex, in a prior written statement, she had stated that she gave a "hand job."

The affidavit states that according to V1, after she finished and went downstairs, V2 went back to the bathroom with the "white guy" and, V1 believes that V2 performed oral sex on him. The affidavit notes that V2 "stated the exact opposite" – that V1 went upstairs with the "white guy" and performed oral sex on him. The affidavit also states that "V1 admitted to giving her mother $100.00 the next day. V1's mother confirmed that V1 gave her $100.00." Zarif contends that this last statement is misleading, implying that the $100 corroborated the claim that V1 received the money for performing the acts described. However, V1 stated in her interview that the money she gave her mother came from performing construction work, a fact not disclosed in the affidavit.

The affidavit then states that, according to V2, after they had all finished, they went to the kitchen area and began drinking vodka out of a bottle. The three males left, and Zarif then stated that he wanted to "hot tub." Both minors went upstairs to the bedroom where a tub was

apparently located, got undressed,[1] and got into the tub. The minors began "making out," when Zarif came in and began recording them with what Cole believed was a digital movie camera. Zarif contends that the allegation that the minors were "making out" in the tub wrongfully implies that they were engaged in a "lewd and lascivious" act. He states that both minors stated to Cole that they viewed the footage that Zarif had recorded and stated that they looked "silly," that it did not "look real," and that they were "giggling." Zarif contends that omission of the minors' characterizations of what they saw on the recorded footage renders this portion of the affidavit misleading.

V2 states that, after they were done in the tub, both got out, dried off, and got dressed. They asked Zarif if they could watch the footage he had recorded. V1 stated that, when the recording began to play, she saw "young girls, maybe only 14 years old, performing sex acts." V2 stated that the girl she saw on the recording was "one of [Zarif's] old girlfriends." Zarif contends that this juxtaposition of the two minors' statements in the affidavit implies that the girl identified by V2 is the same person seen by V1 "performing sex acts." In actuality, Zarif contends, V2 stated that the person she saw on the tape was fully clothed, sitting and talking with Zarif, and that the affidavit is misleading in implying that the two minors are describing the same scene.

---

[1] The affidavit notes a discrepancy in the minors' statements on this point. It states that V1 claims that she kept her sports bra on and took off her pants and put on a pair of green or blue shorts belonging to Zarif, and that V2 was naked. V2 stated that both she and V1 were naked in the tub.

The affidavit then repeats that both minors were shown a six-photo array, and that both picked out Zarif's photo. As stated previously, Zarif contends that this statement is false with regard to V2, who stated that the photo "looked like Alex" but that she did not think it was him.

The affidavit then recites certain information conveyed to Cole by Draper City Police Officers. On February 9, 2005, those officers were asked to assist with locating a runaway juvenile – V2 – who was believed to have been at Zarif's residence. The officers arrived and spoke with Zarif, who stated that he knew V2, but stated that he had not seen her in "several days," which he later refined to "several weeks." Zarif permitted the officers to search the residence for V2, but she was not found. On February 11, 2005, Cole spoke with the officers who had conducted the search, and the officers described the layout and contents of the residence in a manner that matched the description of the premises given by V1, and also reported seeing dark blue or green shorts that matched a description given by V1. Zarif contends that this portion of the affidavit misleadingly omits to mention that Officer Carpenter[2] of the Draper City Police Department searched Zarif's residence on February 10, 2005, specifically looking for a video camera, but did not find one.

Zarif also contends that Cole's failure to state in the affidavit that the minors did not report the events to police

[2] Officer Carpenter is not one of the two Draper City Police Officers mentioned in the affidavit as having searched Zarif's residence on February 9, 2005. Thus, it appears that a second search of the residence occurred on February 10, 2005. No mention of this second search or its circumstances is made in the affidavit.

until after their parents had learned of the events was both material and intentional or reckless.

Based on the foregoing, Cole sought a search warrant permitting the search of Zarif's residence and the specific authorization to search for and seize Zarif's cell phone; any used condoms; a bottle of vodka; hair, fibers, and fingerprints in the home and Zafir's [sic] car; and the camera, among other things. On February 17, 2005, the Magistrate Judge issued the warrant requested by Cole. The record does not reveal when the warrant was executed, or what evidence was seized pursuant to it.

Zarif was subsequently indicted, and on April 7, 2005, a Second Superseding Indictment was returned, charging Zarif with three counts of enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct; one count of possession of child pornography; two counts of enticing a minor to engage in prostitution; one count of possession of a firearm by a prohibited person; and one count of possession of methamphetamine.

II. Motion to suppress/for *Franks* hearing

Zarif moved to suppress[3] the evidence seized pursuant to the warrant on the grounds that the warrant was obtained by means of an affidavit containing material

[3] The motion is not included in the record, and is not immediately apparent from a review of the trial court's docket. The docket does reflect two motions filed on March 25, 2005, one to "suppress guns and drugs not listed in the search warrant" (# 37) and one "for Evidentiary Hearing re: Sixth Amendment violation" (# 38). Our description of the motion is taken from the trial court's order denying it.

misrepresentations. On April 12, 2005, the trial court denied the motion in a written order, without having conducted a *Franks* hearing. The court found that although certain representations contained in the warrant affidavit were either knowingly or recklessly misleading,[4] the affidavit, stripped of those representations, still demonstrated sufficient probable cause for the issuance of the warrant. Specifically, the trial court disregarded the assertion that V2 had positively identified Zarif in the photo lineup, disregarded the assertion that V1 had given her mother $100 the following day, and considered that the minors' characterizations of what they saw on the recording when it was played back to be contradictory. Nevertheless, "even with these falsehoods and omissions redacted," the trial court found that the affidavit had "abundant information for a finding of probable cause." In particular, the trial court noted the undisputed fact that

[4] Specifically, the trial court found that the assertion that V2 positively identified Zarif's photo was false and the court assumed, without necessarily finding, that the falsehood was reckless; that the description of both minors stating that Zarif claimed to sell shoes was neither false nor intentionally or recklessly misleading; that the description of V2 as stating that Zarif looked up numbers in his cell phone was not materially false, and that any untruthfulness by Cole in representing V2's statement on this point would have been negligent, but not intentional or reckless; that the implication that the $100 V1 gave to her mother came from Zarif for performing oral sex was misleading, and was made with reckless disregard; that the representations as to the minors "making out" in the tub was not false; that the implication that the girl seen by V1 in the recording performing sexual acts was the same girl identified by V2 as one of Zarif's girlfriends was misleading, and was intentional or made with reckless disregard; that the omission of Officer Carpenter's failure to find the camera was not misleading; that the omission of V1's prior statement that she performed a "hand job," not oral sex, was not misleading; and that the omission of the fact that the minors did not report the events until after their parents had learned of them was not misleading.

V1 had positively identified Zarif in a photo lineup; the undisputed facts regarding Zarif telling the minors that he operated something akin to an escort service and that he asked them if they wanted to earn money that night by performing oral sex; the fact that V1 described the interior of Zarif's home in a manner that was corroborated by the Draper City Police Officers; the undisputed fact that Zarif introduced the minors to three men, told them to "act professionally," and that the minors performed oral sex on the men; and the undisputed fact that the Zarif filmed the two minors – at least one of whom was naked – "making out" in a hot tub.

The charges against Zarif were tried in a bench trial on May 2, 2005. Zarif was convicted on three counts of enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, 18 U.S.C. § 2251. He was sentenced to fifteen years' incarceration. This appeal followed.

III. Discussion

On appeal, Zarif contends that the alleged misrepresentations and omissions discussed above were intentional or reckless. Although not expressly stated or argued, it appears that Zarif appeals those findings by the trial court that certain alleged misrepresentations or omissions were either not false or materially misleading, or were not intentional or reckless. Zarif further argues that, when stripped of the offending information, the affidavit does not demonstrate probable cause because it does not supply information demonstrating the veracity of the informants.

In *Franks v. Delaware,* 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court held that

in limited circumstances, a defendant is entitled to an evidentiary hearing to determine whether a warrant was issued in reliance on a deliberately or recklessly false affidavit. To be entitled to a *Franks* hearing, a defendant must make a substantial showing that the warrant affiant made a false statement or omitted material information from the affidavit, and that the misrepresentation or omission was made knowingly or with reckless disregard for the truth. *Franks,* 438 U.S. at 155-56; *United States v. Artez,* 389 F.3d 1106, 1116 (10th Cir.2004). In addition, the defendant must show that the misrepresentation or omission was necessary to the finding of probable cause. *Franks,* 438 U.S. at 156. In other words, if, after the allegedly false material is set aside or the omitted material excluded, there remains sufficient content in the affidavit to support a finding of probable cause, no hearing is required. *Franks,* 438 U.S. at 171-72. Whether an affidavit demonstrates sufficient probable cause to support a warrant is a question of law that we review *de novo. U.S. v. Gonzales,* 399 F.3d 1225, 1228 (10th Cir.2005).

Zarif's first argument on appeal appears to be that the trial court erred in finding that certain alleged misrepresentations or omissions were either not misleading or were not made with intent or reckless disregard. We need not reach the question of whether the trial court's findings as to the truth or falsity of these allegations are correct because we find that, even if *all* of the assertions challenged by Zarif were stricken from the affidavit (and all of the allegedly improperly omitted material included), there would still be probable cause for the issuance of a warrant. Zarif does not dispute, for example, allegations in the warrant that he encouraged and facilitated the minors' performing oral sex for money, or allegations that he

videotaped the minors – at least one of whom was naked – engaging in simulated intimacies. These unchallenged allegations supply sufficient probable cause for the warrant that was issued even in the absence of the challenged allegations. Thus, we find that the trial court was correct in concluding that Zarif failed to make the preliminary showing necessary to entitle him to a *Franks* hearing.

Zarif's second argument is that, once the three statements found by the trial court to be intentionally or recklessly misleading are omitted, the affidavit fails to demonstrate sufficient probable cause for issuance of a warrant because the affidavit fails to articulate facts demonstrating the veracity of V1 and V2. Whether a warrant application founded upon an informant's allegations of criminal conduct demonstrates sufficient probable cause is a "practical, common-sense decision," to be made by a magistrate judge in consideration of the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Among the factors that must inform this decision are facts in the warrant demonstrating the informant's reliability, veracity, and basis of knowledge. *Id.* The Supreme Court in *Gates* refused to lay down a rigid rule for how much detail a warrant application must provide about the informant, observing that a deficiency in one factor may be balanced out by the excess in another. *Id.* at 233-34. Indeed, even anonymous tips, when supplemented by independent police investigation, may be sufficient despite the absence of any indication of the anonymous informant's veracity, reliability, or basis of knowledge. *Id.* at 237-38.

There is no indication in the record that Zarif raised this specific issue below. Even assuming he had, however, we find that the affidavit contains sufficient allegations

from which the magistrate judge could have concluded that V1 and V2 were sufficiently reliable witnesses. First, although they occasionally differed in some respects, the two minors' statements corroborated each other, both in general and in many areas of specific detail.[5] Second, V1 and V2 gave detailed descriptions of the alleged wrongdoing, in which they admitted personally participating. *See Gates,* 462 U.S. at 234 ("even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case"). Third, a handful of the facts asserted by V1 and V2 are shown by the affidavit to have been independently corroborated, namely, V1's description of the layout and contents of Zarif's residence and the appearance of his car; Zarif's acknowledgement to the Draper City Police Officers that he knew V2 and had seen her "several days" earlier; and the officers' observation of dark blue or green shorts, matching those described by V1, in Zarif's house. Looking at the totality of the contents of the affidavit, and mindful of the great deference that a reviewing court should pay to the magistrate judge's determination of probable cause, *Gates,* 462 U.S. at 236, we cannot say that the affidavit was so devoid of facts demonstrating the reliability and

[5] The fact that the minors' statements sometimes differed on material points does not defeat the corroborative value of their statements. Such inconsistencies are simply one of the circumstances that the magistrate judge would consider in evaluating the sufficiency of the showing of probable cause. Likewise, the possibility that the statements corroborated each other because the minors may have jointly fabricated their stories was another circumstance for the magistrate judge to consider.

veracity of V1 and V2 that the magistrate judge's finding of probable cause lacked any substantial basis.

IV. Conclusion

The trial court's denial of the motion to suppress is **AFFIRMED.**

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. ARASH ALEXANDER ZARIF Defendant.	ORDER DENYING MOTION FOR *FRANKS* HEARING (Filed Apr. 12, 2005) Case No. 2:05-CR-00117PGC

The defendant, Arash Alexander Zarif, is facing trial on one count of possession of child pornography,[1] three counts of enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct;[2] two counts of enticing a minor to engage in prostitution;[3] one count of possession of a firearm by a restricted person;[4] and one count of possession of methamphetamine.[5] Mr. Zarif seeks to suppress evidence obtained pursuant to execution of a search warrant for his home, his car, and his person. Mr. Zarif alleges that the search warrant was obtained through an affidavit which contained materially false statements and material omissions.

[1] 18 U.S.C. § 2252(a)(5)(B).

[2] 18 U.S.C. § 2251(a).

[3] 18 U.S.C. § 2422(b).

[4] 18 U.S.C. § 922(g)(3).

[5] 18 U.S.C. § 844.

Having carefully reviewed the affidavit and the evidence submitted by the defendant, the court disagrees.

DISCUSSION

As explained in *Franks v. Delaware*, "There is . . . a presumption of validity with respect to the affidavit supporting a search warrant"[6] *Franks* also explains that a defendant who challenges an affidavit is not automatically entitled to an evidentiary hearing. "There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof . . . [p]ointing out specifically the portion of the warrant affidavit that is claimed to be false."[7] Only the affiant's truthfulness can be challenged, and it is not enough that the affiant was negligent or guilty of an innocent mistake in drafting the affidavit.[8] Finally, even if the affiant is guilty of deliberate falsehoods or reckless disregard for the truth, Mr. Zarif is not entitled to a hearing if, setting aside the falsehoods, the affidavit still supports a finding of probable cause.[9] In sum, before a defendant is entitled to a so-called *Franks* hearing, he must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and [that] the allegedly false statement is necessary to the finding of probable cause. . . ."[10]

---

[6] *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 172.

[10] *Id.* at 155.

I. Alleged Falsehoods and Omissions in the Affidavit

The affiant in this case is Detective Kerry Cole of the Draper City Police Department. The affidavit is based upon interviews conducted by Detective Cole with two minors, who are alleged victims in this case, and statements from two other Draper City officers who conducted a consent search of Mr. Zarif's apartment approximately eight days before the affidavit was signed. The court has been provided with video of Detective Cole's interviews with each of the minor victims and has reviewed those videos. In reviewing this motion, the court will refer to the minor victims as V1 and V2 in the same manner as the affidavit. The underlying allegation respecting these victims is that on February 6, 2005, Mr. Zarif, who was 29-years old at the time, took the two minor victims to his home where each performed oral sex on at least one man in exchange for money.

In the discussion that follows, the court will review the affidavit paragraph by paragraph, beginning with the first substantive allegation of the affidavit. The court will then address Mr. Zarif's allegations with respect to each paragraph. The court will make findings as to which portions of the affidavit contain false or misleading information, and, if so, whether that information was stated or omitted either purposely or in reckless disregard of the truth.

Positive IDs

Affidavit: V1 [born in 1989] was interviewed on 2/11/2005. V2 [born in 1988] was interviewed on 2/14/2005. Both positively identified the person they know as "Alex" as ARASH ALEXANDER ZARIF, dob: 12/25/1975, from a

Utah Driver's License photograph placed in a photo lineup.

Defendant's Allegation: Mr. Zarif alleges that while V1 did identify him, V2 failed to identify him, and, according to the affidavit and her own testimony, V1 had never met "Alex" before but V2 said she had been in "Alex's" home before and had sexual intercourse with him.

Analysis: Detective Cole's statement that "both" victims "positively identified" Mr. Zarif is false. V2 did not "positively identify" Mr. Zarif. At approximately 5:10:10 on the video, the following exchange occurs between Detective Cole and V2. Just as the interview is about to end, Detective Cole hands V2 a photo lineup consisting of six drivers license photos and states:

> Detective Cole: "I would like you to look at these pictures and tell me if there is anybody that you recognize."
>
> V2: "He looks kind of familiar. He looks kind of like Alex, but I don't think it's him."
>
> Detective Cole: "What number is that?"
>
> V2: "Number 6"
>
> D2 [sic]: "Alright, what I need you to do is print your name here [handing her a paper] and write the number that you think it is and then sign it and date it."

V2's identification can, at best, be described as a *tentative* identification, but not a *positive* identification. As described in *Franks,* however, the inquiry does not end with a determination that a statement in an affidavit is technically false. The defendant must also make a substantial showing that the statement is deliberately false or in

reckless disregard for the truth. For purposes of this motion, the court will assume, without finding, that the statement was made in reckless disregard for the truth. The court has reviewed the video, and it is clear that V2 initially makes a tentative identification of "Alex" as Number 6 in the photo lineup but then she immediately says "but I don't think it's him." Detective Cole, however, then hands her a paper and asks her to write the number she *thinks* it is. V2 apparently does so without question, and signs her name. It does not appear from the video that there was any coercion or trickery, though perhaps there was some misunderstanding. Nevertheless, given that V2 willingly signed the form the court cannot find that Detective Cole's statement that both victims positively identified Mr. Zarif was deliberately false or in reckless disregard of the truth. It may have been simple negligence or it may be that, in Detective Cole's mind, V2 did in fact positively identify the defendant. Because this is a close question, however, the court will assume for purposes of this motion that the statement was reckless and will review the affidavit on that assumption. The court will also view the affidavit as though the additional information, including V2's statement that, "I don't think it's him," were provided to the magistrate since this statement arguably cuts against a finding of probable cause.

V2's Sexual Encounter With Mr. Zarif

Affidavit: V2 stated on or about 01/22/2005 she went to the house of a person she knows as "Alex" to "hang out." She stated she was introduced to him by a friend from school. V2 said she and Alex drank alcohol and listened to music before going upstairs to the master bedroom. While they were upstairs, Alex asked V2 to massage his back. A

short time later they had sexual intercourse. V2 stated his penis penetrated her vagina.

Defendant: Mr. Zarif does not raise any disputes about this paragraph of the affidavit.

Mr. Zarif's Car

Affidavit: On or about the night of 02/06/05 or early morning of 02/07/05, V2 called V1 and asked if she wanted to "sneak out" of the house and party. Both V1 & V2 were picked up by the person they know as Alex, in his car. V1 described Alex's car as a newer dark colored import made vehicle, she believed was an Audi, with black leather seats. She stated the back seats have seat warmers in them. She stated she sat in the back seat.

Defendant: Mr. Zarif points out several times that V2 did not describe the car.

Analysis: The affidavit does not state that V2 described the car, so there is no dispute about the truthfulness of this paragraph of the affidavit for purposes of this motion.

Mr. Zarif's Business

Affidavit: As they were driving, V1 asked Alex how he made enough money to afford his car. Both V1 & V2 stated Alex told them he sold "shoes", but V1 reported Alex said he owned a "brothel", whole [sic] V2 stated Alex said he owned an "escort service." Alex was asked how much money the "girls" made, and Alex replied between $500.00 to $300.00 for sexual intercourse, and $50.00 for performing oral sex.

Defendant: Mr. Zarif argues that the affidavit is misleading because while when V1 was asked what Mr. Zarif said he did for a living she described it as "selling shoes" but V2 stated twice in her interview that Mr. Zarif said he was a "middleman" for a shoe company. The fault in the affidavit, according to Mr. Zarif, is that this "spin" in the affidavit "is used to imply that V1 and V2's statements that Mr. Zarif prostitutes women *must* be true, or he would not be able to maintain his lifestyle."

Analysis: Mr. Zarif must make a "substantial showing" that the alleged falsehood or omission was made "knowingly and intentionally, or with reckless disregard for the truth. . . ."[11] Mr. Zarif has failed to make this showing. First, the affidavit is not false. Whether Mr. Zarif is a middleman for a shoe company or a salesman, there is nothing false about stating that the victims described his job as selling shoes. Second, there has been no showing that the affidavit was intentionally written to leave out V2's statement that Mr. Zarif said he was a middleman. Leaving out such a minor detail does not even rise to the level of negligence, let alone a reckless or deliberate omission.

Mr. Zarif's Cell Phone

Affidavit: As they continued driving, Alex told them they could make $50.00 for "giving head" (oral sex), and asked if they would be interested in making some money "tonight." V2 said she would do it, but V1 stated she told him she didn't know. Both victims said Alex immediately began calling unknown people, on his cell phone, trying to

[11] *Id.* at 155.

arrange for people to come over to his house to have oral sex with the girls. V2 believes the phone numbers for the people Alex called were recorded in his cell phone because he looked their numbers up in the phone.

Defendant: Mr. Zarif contests the veracity of the last sentence concerning the cell phone. The importance of the statement is that it is used later in the affidavit to request the right to seize the cell phone.

Analysis: The court has reviewed the videotape interview with each of the victims and finds that the challenged statement is not materially false. It is true that V2 did not directly say "I think the numbers were recorded in the cell phone" or that she saw Mr. Zarif look the numbers up in his cell phone, but it can be easily implied from the conversation. First, Mr. Zarif was driving the vehicle at the time he made the calls. V2 was clear that the calls were made while they were in Mr. Zarif's car traveling to his home. V1 was also clear that the calls were made by Mr. Zarif while they were traveling to his home. Second, it is also clear from the interviews that the calls were made quickly after the girls had agreed to perform the sex acts. Neither girl says anything about pulling over to look up numbers. So while the statement could have been rendered more plain by Detective Cole, it appears that any untruthfulness was simple negligence in recalling exactly what the girls had said. The court, therefore, will treat this statement "as is" in conducting the probable cause review. (It should be noted, however, that even if the victims' statements had been rendered more accurate by Detective Cole, there was clearly probable cause to seize the cell phone as it was both evidence of the underlying crime, and an instrumentality of the crime).

Mr. Zarif's Residence

Affidavit: When they arrived at the house, V1 stated Alex pulled his vehicle directly into the garage. The garage is located on the backside of the building, on the bottom level. Both girls described the residence as a tall building with "lots of stairs." A1 [sic – appears to mean V1] said the garage was on the lowest level. On the next level is reported to be the living room and kitchen. In the living room there was a couch, television, and small table.

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Location Where Sex Acts Occurred

Affidavit: On the next level there was a bathroom and another room. Both girls told your affiant this bathroom is where the sex acts occurred. The next level is where [the] master bedroom and bathroom are located. The bathroom is reported to be elevated, and over looks the bedroom.

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Mr. Zarif's Proposition and Instructions

Affidavit: Once inside the residence, Alex asked the girls if they wanted to make money by "giving head" (oral sex). This time both V1 & V2 agreed. Alex then told both victims to go up to the bathroom and "get ready and act professional."

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Other Males Arrive

Affidavit: V2 stated three unidentified male adults arrived together. Both V1 & V2 described the men as one being a "Native American-Indian", with long black hair, who looked "just like" a member of a band. The next man was described as a "Mexican" who was a little older and heavier. The man was described as being a "tall, bit, white guy."

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Mr. Zarif Arranges Sexual Contact

Affidavit: The victims waited in the bathroom until Alex brought two unidentified males up to the bathroom and made introductions. These two were the "Indian" and the "Mexican". After the introductions, Alex told the girls to get started. Neither of the victims could remember the names of the men. V2 said Alex kept checking on them to make sure they were OK.

Defendant: Mr. Zarif does not challenge anything in this paragraph.

V1's Request for Condoms

Affidavit: V1 state [sic] she told Alex she would not perform oral sex on any of the men unless they used a condom. When they switched partners, V1 said she waited until they found another condom for the "Mexican", before she would have oral sex with him. She said the men put on and took the condoms themselves. V2 stated none of the men used condoms at anytime.

Defendant: Mr. Zarif does not challenge any statements in this paragraph.

Victims Perform Oral Sex

Affidavit: Both girls admitted to giving at least each gave one of the men of the men oral sex, victims [sic] said V1 began giving oral sex to the "Indian", and V2 began giving oral sex to the "Mexican", but after about five minutes they switched partners. Both said V2 finished first and went down to where Alex was, and about five minutes later, V1 finished and came down.

Defendant: Mr. Zarif does not challenge anything in this paragraph.

V1 Gives Money to Her Mother

Affidavit: V1 stated after she came down stairs, V2 went back up to the bathroom with "the white guy" and she believes V2 performed oral sex on him. V2 stated the exact opposite, stating V1 went up stairs with "the white guy" and performed oral sex on him. V1 admitted to giving her mother $100.00 the next day. V1's mother confirmed V1 gave her a $100.00

Defendant: Mr. Zarif challenges the implication in the affidavit that the $100.00 V1 gave to her mother came from performing oral sex.

Analysis: Mr. Zarif is probably correct that the statement is inaccurate. Both in her written statement, and several times in her interview with Detective Cole, V1 stated that the money she gave to her mother came from performing construction work. V1 described the

construction work in detail and specifically said she did not want to give her mother the money gained from performing oral sex because it was "dirty money." Moreover, the affidavit does seem to imply that the $100.00 came from performing sex acts. It is not immediately clear, however, whether this false statement was made deliberately or in reckless disregard for the truth. While negligence seems like the likely conclusion, the court will assume for purposes of this motion, without making a formal finding, that inasmuch as the affidavit tends to imply that the $100.00 V1 gave to her money [sic] came from performing sex acts, the statement was in reckless disregard of what V1 actually said. The effects of this falsehood on probable cause will be discussed below.

Victims Drink Vodka

Affidavit: After they had performed the oral sex acts, V2 stated they went into the kitchen area and began drinking vodka out of the bottle described above.

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Mr. Zarif's Hot Tub

Affidavit: A short time later the three unidentified male suspects left. V2 said she wanted to "hot tub", so both V1 & V2 went up to the master bedroom and got undressed. Both reported they were in the tub and V2 was naked. They were "making out" when Alex came in and began recording them with a small silver camera as described above. Your affiant has seen these types of

cameras and believes the camera appears to be a digital movie camera.

Defendant: Mr. Zarif objects that the affidavit attempts to turn what were in fact innocuous innocent activities into criminal activities by implying that the victims actions in the hot tub were "lewd" and "lascivious." But according to Mr. Zarif, "[n]either V1 nor V2 described their activity in the bathtub in a lewd way, or in a way that would establish criminal activity."

Analysis: The court has viewed the videotape interviews and finds that there is no falsehood in the affidavit. Mr. Zarif does not dispute that V1 and V2 said they were in the hot tub together, and that V2 was naked, that Alex came in and told the [sic] they should "make out" or something, and asked if he could record them, and that the girls at least proceeded to pretend to make out while Alex recorded them. The court cannot say that it was a reckless disregard for the truth for Detective Cole to fail to state that the girls believed that they looked "silly" or that it did not "look real" and that they were "giggling." Pretended or not, there is nothing false about the statement that the girls were "making out" in a hot tub while Alex recorded them. The court will leave the statement as is in reviewing probable cause.

At oral arguments, counsel for the defendant seemed to argue that when viewed in context, the statements of the victims show that the police had no probable cause to believe that these acts were criminal. The court disagrees. It is undisputed that both victims stated that the defendant recorded them in a hot tub, while at least one of them was completely naked. Videotaping underage girls in a hot tub "pretending" to make out, at least one of whom was

naked, would be sexual exploitation of a minor.[12] But even if this were not the case, the camera would still be seizable as *evidence* of the other described crimes since it would tend to corroborate the victims' testimony.

Mr. Zarif also points out that while V1 described the video camera, at no point did V2 describe the camera. The affidavit does not say both victims described the camera. While it may [sic] arguable that the implication is that both did, the court finds that this statement is not false. Mr. Zarif has not made a substantial showing that it was somehow an intentional falsehood or reckless on the part of Detective Cole to fail to include this minor detail. Therefore, the affidavit will be viewed as is on this point.

Mr. Zarif's Bedroom Furnishings

Affidavit: V1 described the master bedroom as having very little furniture, only a bed, a dresser and a large bath tub, that looked down on to the bed. The bed was a square shape made from a lighter colored wood, and there were "lights coming from under the bed."

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Victims In Hot Tub

Affidavit: V1 states she did not get into the tub naked, but after she took off her pants, she put on some of "Alex's [dark blue or green] shorts", and left on her sports bra. V2 stated her and V1 got into the tub naked. V2

[12] *See* Utah Code Ann. § 76-5a-3.

stated both her and V1 were totally naked when they got into the bathtub. When the girls got out V2 stated they dried off and put their clothes back on.

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Sex Acts on Video

Affidavit: After they were done, both girls told Alex they wanted to watch themselves, so Alex played back the recording. When the recording began to play, V1 stated she saw "young girls, maybe 14 years old" performing sex acts. V2 stated the girl on the recording was "one of Alex's old girl friends."

Defendant: Mr. Zarif admits that V1 described seeing graphic sexual acts with underage girls on the video camera. Mr. Zarif alleges, however, that the affidavit is materially false because it states simply that V2 described a girl on the video camera simply as "one of Alex's old girl friends." The clear implication of the statement is that the girl V1 said she saw engaged in a graphic sexual act on the camera was also seen by V2 performing a sexual act, and that V2 simply recognized the girl as one of Alex's girlfriends. V2, however, clearly states that the girl she saw on the video was fully clothed, and was just sitting and talking to Alex on the tape. Detective Cole specifically asked V2 whether the girl was naked, and V2 responded, "No."

Analysis: The court has viewed the videotape and, although this is perhaps a close call, agrees with Mr. Zarif that the affidavit is materially misleading on this point. Because Detective Cole specifically asked V2 what she saw

on the video, and whether or not the girl she saw was clothed, the omission of V2's contradiction of V1 is misleading. To simplify matters, the court will again assume, without specifically finding, that the statement was in reckless disregard for the truth and will take this into account in reviewing whether probable cause existed. Moreover, in reviewing whether probable cause would have been found, the court will consider V2's statements specifically contradicting what V1 said she saw on the tape since it goes to the issue of credibility and arguably cuts against finding probable cause.

Photo Lineup

Affidavit: After both interviews, I showed V1 & V2 a photo lineup containing six photographs of men. One of the pictures in the array was of ARASH ALEXANDER ZARIF. Both girls picked Mr. Zarif's photograph as being the person they know as "Alex."

Defendant: As described above, Mr. Zarif disputes this fact.

Analysis: As stated above, the court will assume for purposes of this motion, without finding, that the statement recklessly disregards the truth. It should be noted, however, that there is some truth to the fact that both girls "picked" Mr. Zarif's photograph. While V2 did not positively identify Mr. Zarif from the photo lineup, she did point to his picture and say it looked like the person she knew as "Alex." Nevertheless, it could be reckless to state that both girls "positively identified" Mr. Zarif from the lineup, without, at the very least, clarifying that V2 said that while photo number six "looked like" Alex, she also

said "but I don't think it's him." Because identification of Mr. Zarif is such an important part of the affidavit, a greater degree of care can be expected. In any event, the court will assume this statement was recklessly made without making a formal finding.

V2 as a Runaway

Affidavit: On 02/09/2005 Draper City Police Officers L Stone and J Selph were asked to assist Sandy Police with locating a runaway juvenile, which happened to be V2. (Sandy Police Case #: 05E001436) The officers were asked to respond to 14068 S Pepi Band Road, Draper, Utah, and see if V2 was at the address. (Case # 05K001810).

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Search of Mr. Zarif's Residence for V2

Affidavit: When the officers arrived they met with ARASH ALEXANDER ZARIF, the home owner. Mr. Zarif admitted to officers to knowing V2, but said he had not seen her for "several days." He later said, it had been "several weeks." Mr. Zarif allowed the officers to search the residence for V2. The officers did not locate her.

Defendant: Mr. Zarif does not challenge anything in this paragraph.

Description of Mr. Zarif's Residence

Affidavit: On 02/11/2005 I spoke with Officer Selph in regards to the interior of the residence at 14068 S Pepi

Band Road, Draper. He described the residence to be a multi-level, condo type housing unit. Officer Selph said the main level of the residence is where the front room and kitchen are located. He said there were only a couch, a large television, and small table in the front room.

Defendant: Mr. Zarif does not specifically challenge anything in this paragraph.

Further Description of Residence

Affidavit: Later the same day I spoke with Officer Stone about the residence. He described the residence as having multi floors. On the top floor was bedroom area. He described the bed as being a square shape, made from a light colored wood, matching the description given by V1. On the same level, there is a loft area where the bathroom looks down into the sleeping area. This also matched the description given by both girls.

Defendant: Mr. Zarif does not specifically challenge anything in this paragraph.

Description of Interior of Residence

Affidavit: Next level down, he described a small room with a "futon type mattress" on the floor. He said there were papers scattered all over. Next to this room there was a bathroom.

Defendant: Mr. Zarif does not specifically challenge anything in this paragraph.

Further Description of Interior of Residence

Affidavit: Officer Stone described the main floor as having a big television, a picture on the wall, and he remembered a pair of dark green or blue boxer type shorts on the stairs. He stated he couldn't remember seeing a table in the kitchen.

Defendant: Mr. Zarif does not challenge anything in this paragraph other than alluding to the fact that the description of the shorts is "vague." This would have been obvious to the magistrate and does not need to be addressed here.

More Description

Affidavit: Officer Stone described the main floor as having a big television, a picture on the wall, and he remembered a pair of dark green or blue boxer type shorts on the stairs. He stated he couldn't remember seeing a table in the kitchen.

Defendant: Mr. Zarif does not specifically dispute anything in this paragraph. Mr. Zarif does, however, state: "A large portion of the search warrant affidavit is devoted to Officer Stone and Officer Selph's recitations regarding how the residence is laid out, and what the car in the garage looks like, et cetera in a clear attempt to bolster the statements of Va [sic] and V2 with 'innocent details' related to the floor plan of the house."

Analysis: Of course, details of the floor plan are "innocent" when viewed in a vacuum. However, to the extent the details match the descriptions given by V1 and V2 they are clearly important to establishing where V1 and V2 were and the identity of Mr. Zarif. The fact that

the officers description of Mr. Zarif's house and car generally matched the descriptions given by V1 and V2 could be extremely important to a probable cause determination. More important, however, is the fact that for purposes of this motion, Mr. Zarif has not alleged that anything in these paragraphs is materially false or stated in reckless disregard for the truth.

Video of Sex Acts

Affidavit: Your affiant believes the seizure of the small silver camera was used to record the naked juvenile(s) in the bathtub, and that recording could be stored on compact disc, or video tape, which may have been removed form [sic] the camera. This recording contains images of the naked juveniles in the bathtub, and images of "very young girls" participating in sex acts. These electronically recorded images are commonly down loaded to a computer or other memory storing devices. These down loaded files can contain photographs, audio recordings.

Defendant: As described above, the court has recognized, without specifically finding, that it was reckless to not include V2's contradictory statements in the affidavit concerning what was seen on the video camera.

Seizure of Cell Phones

Affidavit: Due to the fact V2 stated Alex called the unidentified suspects from his cell phone without using any other media to obtain their phone numbers, your affiant reuests [sic] that the cell phone(s) belonging to or used by ARASH ALEXANDER ZARIF be seized, and the

stored information recovered to includes [sic] names, addresses, phone numbers.

Defendant: As described above, V2 did not specifically state that the numbers "Alex" called were stored in his cell phone or that he did not use any other medium to obtain the phone numbers. Nevertheless, the statement is not false as it could easily and reasonably be implied from both victims interviews.

Seizure of Condoms

Affidavit: V1 stated the unnamed suspects used condoms when she performed oral sex on them, therefore your affiant requests to search for used condoms that may assist identifying the unknown male suspects. V1 also stated she work [sic] "Alex's dark blue or green shorts." Officer Stone reported seeing shorts matching that description.

Defendant: Mr. Zarif has raised no specific objections with this paragraph, other than pointing out the conflicting statements by the girls concerning whether or not condoms were used. That discrepancy was clearly noted in the affidavit by Detective Cole.

Seizure of Vodka Bottle

Affidavit: Both V1 & V2 admitted to drinking vodka, with V2 saying they drank from the vodka bottle, therefore your affiant asks to search and seize for a bottle of vodka.

Defendant: Mr. Zarif has not disputed this paragraph.

Seizure of Hair and Fibers

Affidavit: To help establish that the juveniles and suspects were inside the residence, your affiant requests to search for hairs and fibers that would identify the juveniles and suspects. Dark Silver Audi car owned or operated by ABASH ALEXANDER ZARIF, which was used to transport the juveniles to the residence, and may contain finger prints, fibers, or other evidence named above.

Defendant: Mr. Zarif has not raised any specific disputes with this paragraph.

The final paragraph of the affidavit enumerates the items the officers sought permission to seize.

Other Alleged Omissions

Mr. Zarif has raised a few other issues with respect to the affidavit. As described in the affidavit, Mr. Zarif consented to a search of his home on February 9, 2005, when officers arrived looking for V2 who had been reported as a runaway. Detective Cole did not include in the affidavit the fact that Officer Chad Carptenter [sic], of the Draper City Police force, searched Mr. Zarif's residence on February 10, 2005. Officer Carpenter was aware, before he searched the home, of allegations that Mr. Zarif taped minors engaging in sex acts inside the residence. In fact, Officer Carpenter had interviewed V1's mother and had written a detailed two-page narrative concerning the allegations. This means, according to Mr. Zarif, that "when Officer Carpenter went back to Defendant's home to look for V2 again, it is clear that in addition to looking for V2 again, he was looking for evidence corroborative of the reports of the offenses related to video taping. Officer

Carpenter specifically mentions in his report of February 10th, search that he *did not* notice any video camera." According to Mr. Zarif, mentioning Officer Stone's sighting of the dark shorts on February 9th, and not mentioning Officer Carpenter's report that he did not see any video camera "has a materially misleading effect."

At oral arguments, Detective Cole testified credibly that he did have a copy of Officer Carpenter's report. More important, however, is the fact that while Officer Carpenter was aware of the allegations that Mr. Zarif had videotaped underage girls engaging in sex acts, he specifically was not there to look for evidence of that crime. His search was a consent search solely for the purpose of looking for V2. Detective Cole's failure to include this in the affidavit does not render the affidavit false or misleading.

Mr. Zarif alleges, however, that Detective Cole's failure to include Officer Carpenter's statement that he had not seen the video camera is exacerbated by the fact that during her interview, V1 told Detective Cole that the video camera was "on a ledge in the master bedroom" which was presumably in plain view. According to Mr. Zarif, "[t]he omission that the camera was last seen in plain view would have heightened the magistrate's appreciation of the detail that neither Stone, Selph, nor Carpenter saw any video camera, *despite* the fact that when Carpenter was in the house, he was specifically looking for one."

It is undisputed that both V1and V2 said that "Alex" had videotaped them with a video camera. The fact that an officer searching the home a few days later for a runaway girl did not see a video camera lends virtually

nothing to the probable cause determination, and certainly does not render the affidavit misleading.

Mr. Zarif also alleges that Detective Cole's failure to include a prior inconsistent statement from V1 misled the magistrate in the probable cause determination. Specifically, during the interview with V1, Detective Cole points out that the day before in a written statement she had stated that she did not perform oral sex on any one, but had only provided a "hand job" to one of the men. Detective Cole asks V1 if she wants to tell her mother she has changed her story, and she says she already has. Mr. Zarif argues: "Though either scenario would have constituted evidence of crime, what is significant now, and what would have been significant to the magistrate, is that V1 told inconsistent versions of the events. The change in the version of events is of particular importance in this case because the probable cause that a crime was committed in the house and that Defendant committed it was based exclusively on the statements of V1 and V2. Therefore, the veracity of their statements was of vital importance in the probable cause determination."

Mr. Zarif is surely right that the veracity of V1 and V2 is of vital importance. But in the context of the rest of the affidavit, this detail about the mechanics of the sex act is really quite minor. Both victims were clear in telling Detective Cole that "Alex" took them to his house to perform sex acts on other men in exchange for money. In their videotaped statements to Detective Cole, both victims gave detailed descriptions of the sex acts they performed. Given this, the court cannot say that the prior inconsistent statement would have been so obviously important to Detective Cole that it would have been reckless disregard for the truth to fail to include it in the

affidavit. Both acts are criminal.[13] The technical nature of the act could reasonably have seemed unimportant to Detective Cole at the time, who was faced with two young girls, both of whom were telling similar stories concerning what had happened. Including the statement would have shown nothing more than the fact that when originally confronted by her mother, V1 lied about exactly what she had done.

Mr. Zarif also raises some other minor objections. For example, Mr. Zarif states that although both V1 and V2 described the floor plan of the residence "specific detail about furniture, et cetera, was not provided by both persons." The affidavit, however, does not state that the victims described the home in great detail, but merely recites what they did describe. The affidavit also fails to recite that V1 and V2 differed in telling Detective Cole how much money they earned for performing the sex acts. Given that both told Detective Cole that they performed sex acts for money, the exact amount is hardly relevant. The affidavit, according to Mr. Zarif, is also misleading because V1 told Detective Cole she had difficulty remembering certain details. In looking at the videotapes, however, it is clear that what V1 was referring to was that she could not remember the end of the night when she was finally taken home. Mr. Zarif also contends that the affidavit was rendered misleading because it failed to recite the fact that V1 and V2 only reported the alleged crimes after it was discovered by their parents, and that V2 was, in fact, in juvenile detention before her interview. It is alleged that this would have been important to the

[13] Utah Code Ann. § 76-5-401.2.

magistrate because it shows that they had a reason to fabricate their stories. But the fact that they reported what occurred only after their parents discovered it seemingly supports their credibility; and it certainly was not reckless disregard for the truth to omit this information from the affidavit. Finally, Mr. Zarif also raises the fact that the affidavit did not recite that when V2 was asked at the end of her interview whether she had anything else to say, she told Detective Cole that she felt "bad for betraying" Alex because everything she did was "totally voluntary." But rather than undercutting her veracity, this tends to bolster V2's story; it certainly does not render the affidavit misleading that it was not included.

II. Probable Cause

As described above, Detective Cole's affidavit sought a warrant to search (1) Mr. Zarif's house; (2) Mr. Zarif's vehicle; and (3) Mr. Zarif's person. The affidavit also sought authority to seize (1) a small silver video camera; (2) video tapes, CDs, or other media used to store recorded images; (3) written or electronic information including phone numbers, addresses, receipts or other information to be used to identify the male suspects who received oral sex from the victims; (4) telephone records; (5) cell phones; (6) used condoms; (7) dark blue or green shorts; (8) vodka bottle; (9) hairs; (10) fibers; (11) computer; (12) other fruits or instrumentalities of the crimes of sexual exploitation of a minor, prostitution, or unlawful sexual conduct with a minor.

Because the court has assumed, for purposes of this motion, that Mr. Zarif has made a substantial showing that several statements in the affidavit were intentionally

false or in reckless disregard for the truth, the next step is to determine if "the allegedly false statement[s] [and omissions] are necessary to the finding of probable cause. . . ."[14]

In reviewing the affidavit for probable cause, a couple of additional points need to be made. First, crime victims, like other citizen witnesses, are generally presumed reliable.[15] At oral arguments, counsel for the defendant argued that the court must consider the credibility of the victims in this case, given their contradictory statements on several points. The court will, of course, take this into consideration. The court notes that the affidavit did contain several instances of where the victims contradicted each other's story, including which victim performed oral sex on the third male, which victims were naked in the hot tub, and whether condoms were used. The court will also consider factors that favor the victims' credibility which were undoubtedly also considered by the magistrate, including the fact that they were confessing to embarrassing activities, had no apparent reason to lie, and were remarkably consistent on the main points of what occurred and on most of the innocuous minor points, In sum, the court will consider all of the factors that go into a finding of probable cause.

The court has agreed with Mr. Zarif that certain parts of the affidavit are false. First, the court agrees that the statement, made twice in the affidavit, that *both* victims positively identified Mr. Zarif from a photo lineup was

---

[14] *Id.* at 155.

[15] *See generally* WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 3.3(d) (4th ed. 2004).

made in reckless disregard for the truth. There is no dispute that V1 positively identified Mr. Zarif, but V2's identification was clearly equivocal. Mr. Zarif has not challenged, however, the affidavit's recitation that when Officer Stone and Officer Selph went to the home of Mr. Zarif looking for V2, Mr. Zarif admitted knowing her and twice consented to officers searching his home for V2. Nor has Mr. Zarif raised any dispute concerning the victims' accurate description of Mr. Zarif's home, which matched in certain details the description given by the officers who searched Mr. Zarif's home. In sum, even ignoring the parts of the affidavit that are false, the affidavit contains far more than enough probable cause that "Alex," as the victims knew him, was in fact the defendant, Arash Alexander Zarif. This would have been true even if the affidavit had originally included V2's statement in looking at the photo lineup that "It looks like Alex, but I don't think it's him." The magistrate judge would still have been left with one clear positive identification, detailed descriptions of the home from the victims matching the description given by two police officers, and the fact that Mr. Zarif admitted knowing V2 to the police and twice consented to a search of his home for V2. In sum, the magistrate had more than enough probable cause to believe that "Alex" was in fact the defendant, Mr. Zarif.

The court also agrees with Mr. Zarif that it was misleading for the affidavit to recite that V1 gave $100.00 to her mother and to imply that the money came from performing sexual acts. Detective Cole specifically asked V1 about this money and was told in no uncertain terms that the money V1 gave to her mother came from some construction work done by V1. But while the affidavit may be misleading concerning the source of this particular

money, it is undisputed – and the affidavit truthfully recounts – that both victims stated that they were specifically asked by "Alex" if they would be willing to "give head" in exchange for money, and that "Alex" took them to his house, arranged for three men to arrive, instructed the girls to act professional, introduced the girls to the men, and then checked up on them as they were performing oral sex on the men. In other words, the defendant is missing the forest for a tree or two. Even without some allegation about the exchange of money in the affidavit other than this $100.00, there was clearly probable cause to believe that several crimes had been committed by "Alex" and the men who were brought to his home for the purpose of receiving oral sex.

The court also agrees with Mr. Zarif that the affidavit's recitation of what the victims saw on the video camera when it was played back to them was misleading. As described above, V1 said she saw sexual acts with underage girls on the video camera, while V2 said all she saw was one of Alex's girlfriends, sitting fully clothed and talking to Alex. The court finds, however, that regardless of what the victims saw on the camera, that is, even if the victims did not describe any criminal activity on the camera, there was probable cause to seize it based upon the fact that the affidavit truthfully recites that both victims testified that they were videotaped by the camera. The camera was therefore evidence of, if nothing else, the fact that the victims were in the house. Moreover, V1's testimony alone, even if contradicted by V2, would have given probable cause to seize the camera to look for recorded sexual acts with minors since V1 had no apparent reason to lie and would be presumed reliable. In addition, both victims testified that Mr. Zarif videotaped them while

at least one of the underage victims was naked. The fact that the victims described this activity as "silly" and not sexual is irrelevant. Both said Mr. Zarif was taping a nude underage girl. No court would have failed to find probable cause because the victims' stories conflicted on a minor point about what each saw for a few seconds when the video was played back to them given the abundant testimony concerning the video camera and the crimes committed in the home. The court also rejects defense counsel's argument that including the contradictory statement would have undercut the victims' credibility to the point that probable cause could not have been found. As described above, these victims generally told remarkably similar stories. Even had this minor contradiction been included, the affidavit would still have contained abundant evidence from which to find that the victims were credible and to find probable cause.

In sum, while the court agrees with Mr. Zarif as to a few issues concerning inaccurate information in the affidavit, even with these falsehoods and omissions redacted the affidavit is more than sufficient for a finding of probable cause with respect to the places the affidavit seeks authorization to search and the items it requests authorization to seize. Indeed, this affidavit could be described as having abundant information for a finding of probable cause, even if the court were to find in favor of Mr. Zarif on *all* of his challenges to the affidavit. The undisputed portions of the affidavit establish that V1 positively identified Mr. Zarif from a photo lineup, and at least two officers, who are presumed reliable, stated that Mr. Zarif admitted to knowing V2 and twice allowed his house to be searched for her. It is undisputed that both victims are underage and that V2 told Detective Cole that

she had sexual intercourse with "Alex." Both girls stated that "Alex" picked them up in his car on the night in question. V1 described Alex's car, and even stated that she believed it was an Audi. The affidavit truthfully recounts that both victims said that as they were driving along with "Alex" they asked him how he earned a living, and he replied, in general, that he sold shoes, and that he then told them that he operated something along the lines of an escort service. The affidavit truthfully recounts that "Alex" asked them if they wanted to earn some money by "giving head" that night, and that both agreed to do so. The affidavit also truthfully recounts that both girls said that "Alex" called some men from his cell phone while he was driving, to arrange for them to come to his house. The affidavit truthfully recounts that the victims gave some general descriptions of "Alex's" house, which were matched by the descriptions given by police officers who conducted a consent search of his house a few days later. The affidavit truthfully recounts that both victims told Detective Cole that "Alex" took them to a bathroom on the second level of his house, and told them to act professional, and that "Alex" introduced them to three men, which both victims described as a "Mexican," a "Native American," and a "white guy." The affidavit truthfully recounts that each victim performed oral sex on at least one of these men, but that the victims told conflicting stories about whether any condoms were used and which victim performed sex on the third man. The affidavit also truthfully recounts that the victims said that after they were through performing sex acts, they both drank some vodka and then went upstairs to a hot tub in a bedroom, and that the victims' stories differed about whether both were naked, but that it was agreed that V2 at least was naked. The affidavit truthfully states that both victims said

"Alex" came into the room and told them to "make out" and asked if he could record them and that they agreed. The affidavit also truthfully recounts that both victims said they asked "Alex" if they could watch themselves on the video camera and that he played it back for them, and that V1 says she saw other underage girls engaged in explicit sex acts on the tape. These truthfully recounted statements in the affidavit provide abundant reason for a finding of probable cause.

CONCLUSION

The court finds that Mr. Zarif has not met his burden to establish the need for a *Franks* hearing. While the court agrees that in several instances the affidavit is intentionally untruthful, or at least recklessly disregarded the truth, even discounting these statements and considering the contradictory statements that were not included in the affidavit, there would have been abundant remaining evidence for a magistrate to find probable cause. The court therefore DENIES the motion.

DATED this 14th day of April, 2005.

BY THE COURT:

/s/ _____
Paul G. Cassell
United States District
Judge